other hand, in the case of *Hartung* v. *People*,[12] the New York court adopted the rule that it is enough to bring the law within the condemnation of the Constitution that after the commission of the offence it substitutes a different penalty; and that it is not for the court to say that in a given case it would increase or mitigate the severity of the punishment. Although this decision has been affirmed,[13] it has, perhaps, been qualified somewhat by a dictum in a later case to the effect that the mere fact of an alteration in the manner of punishment, without reference to mitigation, would not necessarily render an act obnoxious to the constitutional provision.[14] It has, however, been approved by other courts.[15]

The point under discussion was involved in the recent case of *Malloy* v. *State* (U. S. Sup. Ct., Oct. Term No. 172, April 5, 1915), not yet reported, where it was held that a law of South Carolina changing the method of inflicting the death penalty from hanging to electrocution was not *ex post facto*. The court there seemed to apply both tests, deciding that the form of the punishment was not changed, or if it could be said that a new punishment was substituted, it was a mitigation of the old form. So while it is difficult to formulate a rule which will entirely reconcile all the cases, it seems that the policy of our criminal law could best be maintained by saying that a clear aggravation of punishment is unquestionably *ex post facto*; and where the character of the change is not apparent, though it should not be arbitrarily held objectionable, the accused should be given the benefit of the doubt, and the new form be presumed to be an aggravation until the contrary is shown.

RIGHTS OF THE HALF BLOOD IN DESCENT AND DISTRIBUTION.—There are several States at the present day where no distinction whatsoever is made between relatives of the half and whole blood with regard to the descent and distribution of an intestate's property.[1] There are also some that do not show any discrimination in disposing of a decedent's personal estate.[2] But in all the others,[3] the rights of persons

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[12]*Supra.* It is to be noted, however, that the court also held the law in question to be *ex post facto* on the ground that it was an aggravation of punishment, and this has been held as to similar legislation elsewhere. Medley, Petitioner, *supra.*

[13]Shepherd *v.* People (1862) 25 N. Y. 406.

[14]See People *v.* Hayes, *supra,* p. 492, distinguishing Hartung *v.* People and Shepherd *v.* People on the ground that the alteration in those cases was not merely in the manner of punishment.

[15]State *v.* McDonald (1873) 20 Minn. 136; see *In re* Petty (1879) 22 Kan. 477; State *v.* Willis (1877) 66 Mo. 131, 136.

[1]Carter *v.* Carter (1908) 234 Ill. 507; Larrabee *v.* Tucker (1875) 116 Mass. 562; Mass. R. L. 1902, c. 133, § 2; Kan. Gen. Stat. 1909, c. 33, § 2962; Ore. Gen. Laws. Tit. XLVIII, c. VII, § 7353; Hatch *v.* Hatch (1849) 21 Vt. 450; Wash., 1 Rem. & Ball. Ann. Code, Tit. X, c. VI, § 1347.

[2]Deadrick *v.* Armour (1850) 29 Tenn. 588, 598; Pa. Intestates, 21; N. Y. Decedent Estates Law, § 98 (13); Md. Code 1904, Art. 93, § 130; *et. al.*

[3]And in jurisdictions such as those of the preceding note with regard to real estate.

related to the deceased by only half blood will be found to vary in greater or lesser degree from the rights of those fully consanguinous.

Some jurisdictions, though not disturbing the order of their taking, provide that within the same collateral degree the members of the whole blood shall receive twice as much as those of the half.[4] The States adopting this policy still further divide upon the allowance to be made when all the members of a given class are of the half blood; some grant them the portion they would have received if of the whole blood;[5] others give them whole portions, but double the allotment to ascendants.[6]

Perhaps the most prevalent type of provision, however, is to be found in those survivals of the original absolute exclusion[7] by which no attention is paid to the amount that the half blood[8] shall take, but by which also he is now either postponed to differing extents, or, under certain circumstances, still excluded. In this class especially, detailed diversity of law abounds. In a few places kindred of the half blood are postponed entirely to those of the full blood in the same degree,[9] while in others, half brothers and sisters are postponed to the whole[10] but kindred of the half blood in more remote degrees of consanguinity are permitted to share equally with all in their own degree.[11] When special rules of the sort discussed so far have not prevented, collateral kindred of the same remoteness have been placed upon an equal footing regardless of the proportion their blood bore to that of the intestate.[12] In coming to this conclusion the courts have been called upon to construe legislation modelled more or less closely upon the English Statute of Distributions[13] and they have concurred with the opinions of the English judges[14] in holding that general

[4]Ky. Stat. 1909, c. 39, § 1395; Tex. Civ. Stat. 1911, Art. 2464; Wyo. Comp. Stat. 1910, c. 379, § 5729.

[5]Holmes *v.* Lane (1909) 136 Ky. 21.

[6]Fla. Gen. Stat. 1906, Third Div., Tit. 1, c. 2, § 2299; Mo. Rev. Stat. 1909, c. 2 Art. 15, § 335; Va. Code, Tit. 30, c. 113, § 2549; W. Va. Code 1906 c. 78, § 3168.

[7]Litt. §§ 6, 7, 8.

[8]In collateral kin. The term is sometimes found inappropriately used with reference to members of a lineal line. Since all therein are of the full blood to each other half sisters of a tenant in tail were allowed to succeed to the estate at common law, not as heirs to the deceased, but as heirs to the propositus of both. Pennington *v.* Ogden (1793) 1 N. J. L. 192; Holdsworth, Hist. Eng. Law, 152.

[9]Conn. Gen. Stat. 1902, Tit. 4, c. 37, § 398; Scott *v.* Terry (1859) 37 Miss. 65.

[10]2 N. J. Comp. Stat. 1910, p. 1919, § 5; Del. Rev. Code, c. 85, § 1 (2); see as to realty only, Keller *v.* Harper (1885) 64 Md. 74; Md. Code 1904, Art. 46, §§ 19, 20; Code S. C., § 3555 (2), but in South Carolina living half brothers and sisters share with representatives of ones of the whole blood, id., (4), and representation is not allowed beyond brothers' and sisters' children. Poaug *v.* Gadsden (S. C. 1801) 2 Bay 293.

[11]2 N. J. Comp. Stat. 1910, p. 1920, § 6; McKinney *v.* Mellon (Del. 1866) 3 Houst. 277. Unless the estate is ancestral, the effect of which fact is discussed later.

[12]With the qualification added in note 11.

[13]22, 23 Car. II, c. 10; amended 1 James II c. 17, § 7.

[14]Smith *v.* Tracy (1677) 1 Vent. 323; Crooke *v.* Watt (1690) 2 Vern. *124, affirmed in the House of Lords, Show, P. C. 108.

words in an act such as "brothers and sisters", "next of kin", etc., when used without modification include all those who answer that description whether of the whole or half blood.[15] The issue of a deceased half blood member of a given class has likewise been allowed the right of representation *per stirpes* such as is given the descendants of one of full blood in the same class.[16] But when the estate claimed came to the intestate by descent, devise, or gift from an ancestor, the chance that his half blood relations will obtain it is further curtailed. The interpretation of laws that raise distinctions in such a case first requires that he to whom the word ancestor refers be defined. Accordingly, it has been substantially agreed that the term embraces both those of collateral and lineal lines, and applies in a particular instance, not to the original perquisitor but only to the individual from whom the property immediately came.[17] Furthermore, as is pointed out by the recent case of *Farmers' Loan & Trust Co.* v. *Polk* (N. Y. 1915) 166 App. Div. 43, when a remainder is given in a deed of trust to a life tenant's "next of kindred" the latter are to be ascertained by the rules that govern the devolution of property irrespective of its source, since that in question does not come through the life tenant as an ancestral estate, but is conferred directly by the settlor himself and so there is nothing to exclude any of the half blood from the description of next of kindred. If, however, the property did come from an ancestor within the meaning of the statute, some preference is usually shown those relatives of the intestate who are of the ancestral strain. In some States if the land descended from parent to child and the latter dies an unmarried infant it will go to the surviving children of that parent whether they are of whole or half blood with the intestate.[18] The rule is commonly of wider scope, applying to all ancestral estates without minute distinction as to source[19] but only operating against those half blood kindred that lack the blood of the ancestor entirely.[20] The courts of many jurisdictions say that the legislative intent was simply to postpone even those

[15]Estate of Lynch (1901) 132 Cal. 214; Clark *v.* Sprague (Ind. 1840) 5 Blakf. 412; Prescott *v.* Carr (1854) 29 N. H. 453; Edwards *v.* Barksdale (S. C. 1836) 2 Hill Eq. 416. The phrase "of the blood" has also been held to include half as well as whole. Gardner *v.* Collins (1829) 27 U. S. 58; Baker *v.* Chalfant (Pa. 1840) 5 Whart. 477; Beebee *v.* Griffing (1856) 14 N. Y. 235.

[16]Anderson *v.* Bell (1894) 140 Ind. 375. The extent to which representation is allowed varies with the jurisdictions and in some it is quite limited, *e. g.* Poaug *v.* Gadsden, *supra.*

[17]Wheeler *v.* Clutterbuck (1873) 52 N. Y. 67; Cliver *v.* Sanders (1858) 8 Oh. St. 501; Gardner *v.* Collins, *supra.*

[18]*In re* Estate of Van Orsdol (1913) 94 Neb. 98; Crowell *v* Clough (1851) 23 N. H. 207. To such a proviso there is often added the broader rule of the following note, see for example Minn. Gen. Stat. 1913, § 7238 (5), (7); § 7242.

[19]The following is a typical form: "Relatives of the half blood and their descendants, shall inherit equally with those of the whole blood and their descendants, in the same degree, unless the inheritance came to the intestate by descent, devise or gift from an ancestor; in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance." New York Decedent Estate Law, § 90.

[20]Coleman *v.* Foster (1895) 112 Ala. 506; Kelly *v.* McGuire (1885) 15 Ark. *555; *In Re* Simpson's Estate (1913) 144 N. Y. Supp. 1099.

to others in the same degree,[21] but some have favored members of a more remote class before them[22] and the language of the opinions would warrant the conclusion that they are to be left in absolute exclusion.[23] Unless a statute positively requires this last construction there would seem to be nothing in our laws demanding it, for they are no longer actuated by the feudal solicitude for the blood of the first purchaser that deemed an escheat preferable to inheritance by another line,[24] and the general trend of both legislation and decision has been to enlarge more and more the rights of an half blood in intestate succession. Since the purpose has been throughout to throw off arbitrary rules and to endeavor to dispose of a deceased's property as he might have been led by ties of affection to dispose of it himself, it is reasonable to suppose that the somewhat ambiguous provision so commonly found in relation to ancestral estate was only intended to apply as between members of the same class.

ATTORNEY'S LIENS.—An attorney had a right at common law, generally designated as a retaining lien,[1] to hold property of his client till the latter paid him all that was due him. As in the case of all common law liens, it was essential that the attorney have possession of the property,[2] and that it be acquired in the regular course of his

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[21]Estate of Smith (1901) 131 Cal. 433; Estate of Kirkendall (1877) 43 Wis. 167; Rowley *v.* Stray (1875) 32 Mich. 70; Pond *v.* Irwin (1887) 113 Ind. 243; the Code of Alabama 1907, c. 74, Art. 1, § 3758 explicitly lays down this rule. And in Georgia, where it is provided that the half blood on the maternal side shall not take until after both half and whole on the paternal no matter how the property was acquired by the intestate, it is held that a member of the former class will exclude those of the latter who are more remote. Ector *v.* Grant (1901) 112 Ga. 557.

[22]Dozier *v.* Grandy (1872) 66 N. C. 484; Amy *v.* Amy (1895) 12 Utah 278; Wheeler *v.* Clutterbuck, *supra*; Kelly *v.* McGuire, *supra*. In Tennessee the half blood of that side of the family from which the land did not come is only postponed until the half blood on the other side is exhausted. Nesbit *v.* Bryan (Tenn. 1852) 1 Swan 468; Code 1896, c. 4, Art. 1, § 4163 (3) (a).

[23]See Wheeler *v.* Clutterbuck, *supra*; and especially Amy *v.* Amy, *supra*; Kelly *v.* McGuire, *supra*. In New Jersey half brothers and sisters not of the blood of the ancestor have been admitted from an early date, Den *v.* McKnight (1830) 11 N. J. L. 456, but in more remote degrees those not of the blood of the ancestor were formerly shut out, see Stretch *v.* Stretch (1818) 4 N. J. L. 182; Bray *v.* Taylor (1872) 36 N. J. L. 415. At the present time, however, it would seem the half blood in more remote degrees get the estate if there is no one in existence, however remote, entitled by virtue of inheritable blood, see 2 N. J. Comp. Stat. 1910, p. 1920, § 6.

[24]See Brown *v.* Brown (Vt. 1815) 1 D. Chip. 360. And the true theory of the common law rule is sufficiently shrouded in obscurity to forbid its being regarded as a sound basic principle that should serve as a guide to construction, see 2 P. & M. Hist. Eng. Law (2nd Ed.) 302-7; 4 Kent, Comm. *406.

[1]It has been called a right of set-off, Wells *v.* Hatch (1861) 43 N. H. 246; also a right of defalcation. Dubois's Appeal (1861) 38 Pa. 231.

[2]Bozon *v.* Bolland (1839) 4 Myl. & C. 354; Nichols *v.* Pool (1878) 89 Ill 491. A surrender of the property, even through mistake, destroys the lien. Dicas *v.* Stockley (1836) 7 C. & P. 587.